No. 669.

Br. of Turner & Burry

Filed May 13, 1901.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

THE LAKE STREET ELEVATED RAILROAD COMPANY, *Plaintiff in Error,* vs. THE FARMERS' LOAN AND TRUST COMPANY et al., *Defendants in Error.*	Writ of Error to Supreme Court of Illinois.

Motion to Vacate Supersedeas and Suggestions in Support Thereof.

HERBERT B. TURNER,
WILLIAM BURRY,
Solicitors for The Farmers' Loan and Trust Company, Defendant in Error.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

THE LAKE STREET ELEVATED RAILROAD COMPANY, *Plaintiff in Error,* *vs.* THE FARMERS' LOAN AND TRUST COMPANY et al., *Defendants in Error.*	Writ of Error to Supreme Court of Illinois.

MOTION TO VACATE SUPERSEDEAS AND TO DISMISS OR AFFIRM.

Now comes the Farmers' Loan and Trust Company, defendant in error, and moves the court to vacate the *supersedeas* granted in the above entitled cause.

And said defendant in error also moves the court to dismiss the writ of error granted in this cause.

And said defendant in error also moves the court, in case the motion to dismiss said writ of error be not granted, that the judgment of the Supreme Court of Illinois be affirmed, on the ground that the said writ of error was taken for delay only, and that the question brought up by the writ of error is so frivolous as not to need further argument.

This cause was formerly before this court, and on March 26, 1900, an opinion was handed down, which is reported in 177 U. S., 51. The order of this court was, "Accordingly, the judgment of the Supreme Court of Illinois is reversed and the cause is remanded to that court for further proceedings not inconsistent with this opinion."

The Supreme Court of Illinois had affirmed a decree entered by the Superior Court of Cook County. The order of this court therefore involved the reversal of that decree of the Superior Court. In its opinion this court plainly indicated that after the Superior Court's decree was reversed the bill should be dismissed.

The mandate of this court and a copy of its opinion were filed in the Supreme Court of Illinois on March 2, 1901, and the Farmers' Loan and Trust Company moved that the decree of the Superior Court be reversed and the cause remanded to that court, with instructions to dismiss the bill. The Lake Street Elevated Railroad Company insisted that, for certain reasons, the mandate of this court could not be obeyed and that the Illinois Supreme Court had no power to order a reversal of the decree of the Superior Court or to order that the bill be dismissed, and it filed a counter motion substantially that the Illinois Supreme Court should hold the mandate of this court to be unavailing, should not reverse the decree of the Superior Court and should allow the decree—including the injunction part—to stand. The long assignment of errors is all directed to this one point.

The Supreme Court of Illinois granted the motion made by the Farmers' Company, reversed the decree of the Superior Court and remanded the case to the Superior Court with directions to dismiss the bill.

In so doing the Illinois Supreme Court followed exactly the letter and spirit of the mandate and opinion of this court.

Thereupon the Lake Street Elevated Railroad Company sued out the present writ of error and has obtained an order for a *supersedeas* thereon.

We submit that it very plainly appears that this writ of error is taken out for purposes of delay only, and that any points made in support of it are frivolous; that a writ of error to a state Supreme Court and its accompanying *supersedeas* are discretionary.

We submit especially that the *supersedeas* granted in this cause, with its tendency to embarrass other litigation shown in the opinion of this court, should be vacated.

We attach to this motion suggestions in support of the motions now made, and we have also printed and file herewith copies of the mandate of this court, of the order and mandate of the Supreme Court of Illinois entered in pursuance thereof, of a motion made by the Lake Street Company in the Illinois Supreme Court for leave to file a supplemental transcript, and of the petition for this writ of error and the assignments of error, as the same appear in the transcript, which, it is believed, is all that is necessary to be considered by the court.

The motions herein made are therefore respectfully submitted to the court.

HERBERT B. TURNER,
WILLIAM BURRY,
Solicitors for the Farmers' Loan and Trust Company.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

THE LAKE STREET ELEVATED RAILROAD COMPANY, *Plaintiff in Error,* vs. THE FARMERS' LOAN AND TRUST COMPANY et al. *Defendants in Error.*	Writ of Error to Supreme Court of Illinois.

SUGGESTIONS IN SUPPORT OF MOTIONS TO VACATE SUPERSEDEAS AND TO DISMISS OR AFFIRM.

The facts in this case appear fully in the opinion filed [illegible]

Before we prepared these suggestions we had been informed by a letter dated April 25, 1901, (filed) from counsel for the plaintiff in error that "the record is now on its way to Washington, in accordance with the practice in such cases." Since writing these suggestions, and the accompanying printed parts of the record, we have been informed by that counsel that he does not intend to file the record in time for these motions. This has necessitated our filing the record. We have also prepared an index of that record, and prefixed it to the printed parts of the record submitted.

The record on the present writ of error supplements the record on the former writ of error, which was general number 16,939, or No. 108 of the October term, 1899.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

THE LAKE STREET ELEVATED RAILROAD COMPANY, *Plaintiff in Error,* vs. THE FARMERS' LOAN AND TRUST COMPANY et al. *Defendants in Error.*	Writ of Error to Supreme Court of Illinois.

SUGGESTIONS IN SUPPORT OF MOTIONS TO VACATE SUPERSEDEAS AND TO DISMISS OR AFFIRM.

The facts in this case appear fully in the opinion filed by this court, reported in 177 U. S., 51.

The facts pertinent to the present motion are that in January, 1896, the defendant in error, as mortgage trustee, filed in the Federal court at Chicago a bill to foreclose a mortgage given by the Lake Street Elevated Railroad Company. On the same day, and shortly thereafter, the Lake Street Elevated Railroad Company filed in the Superior Court of Cook County this cause now before the court, and in it sought, among other things, to

remove defendant as trustee, and to enjoin the prosecution of the foreclosure case in the Federal court. The Farmers' Company removed that suit to the Federal court in Chicago, and, on a motion to remand, the Federal court held that it was properly removed.

The Superior Court, however, holding that the case had not been properly removed, proceeded to a hearing and entered a decree granting the prayer of the bill. That decree was appealed to the Appellate Court of Illinois and there affirmed. It was then appealed to the Supreme Court of Illinois and there affirmed. It was then brought to this court by writ of error, and upon that writ of error this court rendered the opinion in 177 U. S., 51, and directed that, "Accordingly the judgment of the Supreme Court of Illinois is reversed and the cause is remanded to that court for further proceedings not inconsistent with this opinion."

The general effect of the opinion of this court is that the Federal court at Chicago acquired by the foreclosure case prior jurisdiction of the entire subject-matter of the suit in the state court, that the suit in the state court was therefore improper and superfluous, and that every matter contained in the original bill filed in the state court could have been and ought to have been set up by answer to the prior foreclosure bill. The effect of the opinion of this court is that there never was any reason for bringing the Superior Court case and that therefore it ought to be dismissed.

On the opinion and mandate of this court being filed in the Supreme Court of Illinois, that court, following the opinion of this court both in letter and in spirit, reversed the decree of the Superior Court and remanded the case with directions that the bill be dismissed.

The order of the Supreme Court of Illinois entered April 17, 1901, recites in full the mandate of this court and then proceeds as follows:

"Therefore, in obedience to said mandate and in compliance therewith it is considered by the court that the judgment of the Appellate Court and decree of the Superior Court in this behalf rendered be *reversed*, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the Superior Court of Cook County with directions to dismiss the bill.

And it is further considered by the court that appellant Farmers' Loan and Trust Company recover of and from the said appellees, Lake Street Elevated Railroad Company, the American Trust and Savings Bank and the Northern Trust Company, its costs by it in this behalf expended, and that it have execution therefor."

We submit that this order of the Supreme Court of Illinois is so exactly in conformity with the order and opinion of this court that the present writ of error must plainly be taken for delay and upon frivolous grounds.

The motion for the order entered by the Supreme Court of Illinois was resisted by plaintiff in error on two grounds:

(1) That the only effect of the motion and opinion of this court was to modify the decree of the state court, *by setting aside so much of the decree as enjoined the further prosecution of the foreclosure suit*, and that it was the intention of this court that the remainder of the decree, including that part which removed the trustee, should stand.

(2) That, after the entry of the order of affirmance in the State Supreme Court, and before the supersedeas was granted by this court, the co-trustee appointed a successor to the defendant in error, on the ground that a vacancy was created by the decree removing defendant in error as trustee, that an order was entered approving this

appointment, and that, therefore, the State Supreme Court was without power to give any effect to the mandate of this court.

1. AS TO THE CONTENTION THAT THE MANDATE AND OPINION OF THIS COURT ONLY MODIFIED THE DECREE OF THE STATE COURT, BY STRIKING OUT SO MUCH OF THE DECREE AS ENJOINED THE FURTHER PROSECUTION OF THE FORECLOSURE CASE.

The principal parts of the original decree appealed from are as follows:

"It is therefore ordered, adjudged and decreed by the court that the said defendant, the Farmers' Loan and Trust Company, be and is hereby removed as trustee or co-trustee under the said mortgage or deed of trust," etc.

"And it is further ordered, adjudged and decreed by the court that the said defendant, the Farmers' Loan and Trust Company, and its attorneys, solicitors, officers, agents and servants, and each and every of them, be and they are hereby perpetually enjoined and restrained from taking any proceedings, or bringing or prosecuting any suit or suits to foreclose said mortgage or trust deed from said complainant to said American Trust and Savings Bank and said Farmers' Loan and Trust Company, or acting in any manner whatsoever under and by virtue of the terms, provisions and conditions of said mortgage or deed of trust," etc.

The jurisdiction of the Superior Court to make this decree was challenged at the outset by the fact that there had been a petition and bond filed to remove the case to the Federal court. The petition and motion thereon were denied by the Superior Court.

It will be at once seen that the question of whether the

case was properly removed to the Federal court is jurisdictional and one that must be determined, unless on some other ground the bill is to be dismissed and finally disposed of. For if, for any reason, or for any purpose, or for the entry of any decree, that suit was to be continued, then it would have been absolutely necessary that the question of removal be passed upon by the highest court to which the case went.

The question of removal was fully presented to this court, as appears by the opening paragraph of the opinion, which speaks of questions of removal "which for reasons presently to be stated *we have not found it necessary to decide.*"

Inasmuch as it was absolutely necessary that the question of removal should be decided if the case was to proceed further, this is an express declaration that the case will on other grounds be finally disposed of in that opinion.

The opinion held that the foreclosure suit was prior in time, and that the Federal court had thereby acquired full jurisdiction of the entire matter.

In its opinion this court held that the foreclosure case started in the Federal court was prior in time, and that that court had thereby acquired jurisdiction of the entire matter, to the exclusion of other courts taking cognizance of any matter properly involved in that foreclosure case. This court further held that every question raised or taken in the Superior Court suit could have been, and should have been, properly raised by answer or by cross-bill in the foreclosure suit. If this is so, then the reason for the existence of the Superior Court suit ceased and it should be dismissed. This, we submit, is the

necessary effect of the opinion of this court. Any other view would be inconsistent with the declaration of the court that it was not necessary to decide whether or not the case was properly removed from the Superior Court to the Federal court.

If the Superior Court suit had no *raison d'etre* because the foreclosure suit was pending before the state court suit was begun, and if, for that reason, it should be dismissed, then of course it became unnecessary to pass upon the question of whether that superfluous suit was removed or not.

The action to be taken would be simply to dismiss it.

An examination of the opinion shows that this was plainly what was held. It decides that the foreclosure suit started in the Federal court was first instituted, and that it vested in that court the

"power to hear and determine all controversies relating thereto and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power."

The opinion further states that,

"the principal matters in dispute are the *legal competency* of the Farmers' Loan and Trust Company *to act as trustee* under the mortgage, and whether * * * the Farmers' Loan and Trust Company *can proceed to enforce* the provisions of the mortgage. * * * And these are the matters which *are necessarily involved*, and *can be properly raised*, and determined in the Circuit Court of the United States, whose jurisdiction had attached by the filing of the bill of foreclosure before the commencement of the suit in the state court.

The defendants could not defeat jurisdiction thus acquired, and supplant the case, by bringing suit in another court, and procuring an *ex parte* injunction seeking to restrain the service of process already issued.

We think that this salutary rule is applicable to the present case. The bill filed in the Federal court looked

to the enforcement of the trusts declared in the mortgage, the control of a railroad through a receiver, the sale of the railroad, and the final distribution of the assets of the company. Such a proceeding *necessarily involves the right of the complainant trustee to act as such*, and the determination of the controversy in respect to the ownership of the bonds and to the power of a majority of the bondholders, by an agreement with the stockholders, to dispense with an enforcement of the provisions of the mortgage by judicial proceedings.

These questions are not for our consideration, unless and until they are brought before us on appeal from a final decree of the court *whose jurisdiction was first legally invoked to determine them.*"

This court, therefore, plainly considered the proceedings in the Superior Court a superfluous, useless and improper proceeding, and that that bill ought to be dismissed, leaving the parties to raise all these questions in the foreclosure suit pending in the Federal court.

The express holding of the opinion is (p. 62) "that the Appellate Court of the First District of Illinois erred *in affirming said decree* [of the Superior Court], and that the Supreme Court of Illinois *erred in affirming the judgment of the said Appellate Court.*"

Following this is the direction of the opinion:

"Accordingly, the judgment of the Supreme Court of Illinois is reversed, and the cause is remanded to that court for further proceedings not inconsistent with this opinion."

Its judgment of affirmance is "reversed." Further proceedings must not be inconsistent with the opinion. To permit the Superior Court case to proceed in any way would be inconsistent with the opinion, because the opinion says that for reasons therein given it is not necessary even to determine whether the cause was properly removed or not.

To allow any part of the decree of the Superior Court to stand would be to hold that it rightfully exercised jurisdiction to hear the case and enter a decree. This would be plainly contrary both to the express holdings of this court that the Federal court had acquired prior jurisdiction of the entire subject-matter and that it was unnecessary to pass upon the question of removal.

This court states the two principal matters in dispute in the state court suit to be:

1. "The *legal competency* of the Farmers' Loan and Trust Company to act as trustee under the mortgage," and

2. "Whether, in view of the controvery between the two sets of bondholders," etc., "the Farmers' Loan and Trust Company *can proceed to enforce* the provisions of the mortgage.

These are matters which are *necessarily involved*, and can be properly raised and determined in the Circuit Court of the United States."

These two questions state the entire substance of the state court bill, and in the same paragraph the opinion disposes of them by saying that their proper place is in the foreclosure case.

Clearly, in using the language "the *legal competency* of the Farmers' Loan and Trust Company *to act as trustee*," the court referred to the entire matter involved in the portion of the Superior Court bill that referred to non-compliance with the laws of Illinois and incompetency of the trustee, and prayed the appointment of a new trustee on that account. This question is therefore covered by the opinion of this court, and nothing can remain but that the Superior Court should dismiss the bill.

The Lake Street Company claims that even if the Superior Court had, when it entered the decree, no power

to enjoin the prosecution of the foreclosure suit, yet it had power to remove the trustee. It would be difficult to conceive a more direct way of interfering with the jurisdiction of the Federal court in the foreclosure case than by removing the complainant from its position of trustee. Whether the result is accomplished by injunction or by disabling the complainant matters little. It would be an interference with the prior jurisdiction the Federal court acquired in the foreclosure case.

So completely did this court dispose of the right of the Superior Court to act on all these questions that, although they all were fully raised in the record, it said:

"These questions are not for our consideration, unless and until they are brought before us on appeal from a final decree of the court whose jurisdiction was *first* legally invoked to determine them."

The stress laid by appellees upon the last sentence of the opinion, in which the court says that "the Superior Court erred in its decree perpetually enjoining," etc., is strained.

The context shows that this language was only descriptive of the decree. The language is not that "the Superior Court erred in *that part of its decree* perpetually enjoining," etc., but that "the Superior Court erred in *its* decree."

The decision means, not that the state court had no jurisdiction *to enjoin* the suit in the Federal court, but that the Federal court had acquired prior jurisdiction of the entire subject-matter, and that therefore the Superior Court had no jurisdiction *to act at all.*

The decree directs a conveyance by appellant to another trustee. Can that part of the decree be properly obeyed while the Farmers' Loan and Trust Company is the sole

complainant in the foreclosure case pending in the Federal court? Would not obedience to the Superior Court decree in that particular at once deprive the Farmers' Company of its character as complainant in the Federal court? And would not compelling appellant to make such a conveyance and so obey the decree, interfere seriously with the suit pending in the Federal court?

It is apparent from its opinion that this court considered the institution of the state court suit a hinderance and an impediment to and an interference with the foreclosure suit in which the Federal court had acquired prior jurisdiction. The entire history of the litigation as it appeared in the different opinions of the different courts shows plainly that the object of the Superior Court suit was to prevent or delay the foreclosure case.

From a general glance at the entire controversy, this purpose in instituting and pressing the Superior Court case stands out prominent. This present writ of error is but a continuation of that policy and therefore we submit that our motion to affirm on the ground that the writ of error is taken on frivolous grounds and for delay should be granted.

The opening paragraph of the opinion of this court, in which it is expressly stated that for reasons in the opinion it is not necessary to decide whether the case was removed or not, plainly indicates that this court considered that in that opinion it was fully and finally disposing of the Superior Court case.

That a decree upon such a proceeding, tending to embarrass the prior jurisdiction of another court, should be reversed *and the bill dismissed*, is shown by the cases of *Orton* v. *Smith*, 18 How., 263.

Masson v. *Piggott*, 11 Ill., 85.
Ross v. *Buchanan*, 13 Ill., 58.

In each of these cases the decree was reversed and the bill dismissed, the court in the last case cited saying:

"The rule in cases of concurrent jurisdiction is that the tribunal which first acquires jurisdiction of the subject-matter must proceed to a final disposition of the case.

The decree will be reversed and the bill dismissed."

Other leading cases to the same effect are:

Sharon v. *Terry*, 36 Fed. Rep., 337.
Brooks v. *Delaplaine*, 1 Md. Ch., 354.
Riggs v. *Johnson County*, 6 Wall., 196.
Logan v. *Lucas*, 59 Ill., 238.

2. THE CONTENTION THAT THE STATE SUPREME COURT WAS POWERLESS TO ACT UNDER THE MANDATE OF THIS COURT, BY REASON OF THE ALLEGED APPOINTMENT OF A SUCCESSOR TO THE DEFENDANT IN ERROR BEFORE THE SUPERSEDEAS WAS ISSUED.

When defendant in error moved in the Supreme Court of Illinois that the decree of the Superior Court be reversed and a mandate issue directing the Superior Court to dismiss the bill, a counter-motion was made by the Lake Street Company. That motion was that it have leave to file in the Supreme Court of Illinois a supplemental transcript from the Superior Court of Cook County, showing that subsequent to the appeal from the decree entered therein a new trustee had been appointed to take the place of the Farmers' Company which had been by the state court removed from its position as trustee under the mortgage made by the Lake Street

Company, and that appointment had been made and confirmed in the Superior Court during the ten or fifteen days that elapsed between the affirmance of the decree of the Superior Court by the Supreme Court of Illinois, and the perfecting of a *supersedeas* from this court upon the writ of error taken out to the judgment of the Supreme Court of Illinois.

Counsel for the Lake Street Company, at the time we applied to the Supreme Court of Illinois for a mandate, contended that the decree had been carried out as between the parties, by the appointment of a successor to the Farmers' Company, and that therefore no revision of the decree was possible, and in their printed suggestions to the Supreme Court of Illinois said on this point:

"This court is now powerless to further act under the mandate of the Supreme Court of the United States."

"The mandate of the Supreme Court of the United States cannot affect the rights of the parties under the record of the Superior Court as it now stands."

"Nor can the court stay the effect of the *injunction* part of the decree."

First. It is perhaps enough to say that the motion of the Lake Street Elevated Railroad Company, for leave to file the supplemental record, *was not granted*, and that therefore that record and the matter it contains and the subsequent action taken by the Superior Court of Cook County was not before the Illinois Supreme Court, *is not before this court*, and cannot be considered. The clerk of the Supreme Court of Illinois has certified it as part of the record filed, but has done so improperly, and the date of its filing, the motion for leave to file it and the absence of any order granting that leave show that it is not part of the record.

As, however, that supplemental record may be presented

in answer to our present motion, we suggest that the Illinois Supreme Court may have declined to consider the additional abstract, because the matter contained in it, even if proper for consideration, was wholly void, and the action of the Superior Court in attempting to appoint a successor to the Farmers' Company was wholly void.

The judgment of the Supreme Court of Illinois was entered on June 18, 1898. Before a *supersedeas* from this court was perfected to that judgment, on June 24, 1898, as shown by the supplemental record, upon one day's notice to the opposite side, a copy of the order of affirmance was filed in the Superior Court and the case was called up in that court and the order entered which it is claimed appointed a successor to the Farmers' Company. Section 84 of the Illinois practice act, however, provides that, after a remanding order is filed in the *nisi prius* court, ten days' notice must be served upon the opposite side of a motion to redocket the case and the entry of any order therein. The order upon which the Lake Street Elevated Railroad Company relies was entered, as shown by the supplemental transcript, six days after the order of affirmance by the Illinois Supreme Court and one day after a copy of that order was filed in the *nisi prius* court. The requirement of ten days' notice was not therefore complied with. This ten days' notice has been held by the Illinois courts to be substantially equivalent to service of process for the reinstatement of the case, and is jurisdictional and necessary before the *nisi prius* court can proceed. *Ligare* v. *City of Chicago*, 168 Ill., 151; *Miller* v. *Glass*, 14 Ill. App., 177. And in *People* v. *Wadlow*, 166 Ill., 119, it was held that until the case was properly redocketed in the state court in compliance with the statute, the suit had not returned to that court so that

any proceedings could be had therein. While one day's notice was given to the opposite party of the application for an order appointing a new trustee, and while the party appeared in response to that one day's notice, yet no consent was given and no waiver made of the right to the ten days notice.

Second. In support of their position two or three cases were cited by counsel for the Lake Street Company, where this court declined *upon motion made pending a writ of error* to undo what the state court had done before the *supersedeas* was granted. This, however, is an entirely different matter from proceedings taken after final judgment of this court.

The broad statement that this court can never undo or set aside anything done under an erroneous judgment of a state court if such act is done between the entry of the judgment of the State Supreme Court and the perfecting of a *supersedeas* from this court, is enough to show upon its face its erroneous character.

The judgment of this court is that the decree which removed the Farmers' Loan and Trust Company as trustee must be reversed. If that decree is reversed, then the Farmers' Loan and Trust Company is reinstated as trustee and there is no room for its successor.

There is of course here no question of the rights of a *bona fide* purchaser for value. Even if we regard the supplemental record as being in the case, it simply shows the appointment of a new trustee, but does not show that that new trustee stands in the position of a *bona fide* purchaser for value.

It is a rule of law too well settled to call for discussion, that the reversal of a decree takes away all rights given

to the parties by the decree and restores them to their original position. As between the parties to the suit, upon the reversal of a decree the party successful in the court below must restore to his opponent that which the decree took away from him.

We have here no innocent purchaser for value. The supplemental record ought not to be considered upon this application. But, even if considered, the most that it shows is a document wherein the American Trust and Savings Bank as trustee attempted to appoint the Equitable Company as successor to the Farmers' Company, under the trust deed.

When the main decree is reversed as having been wrongly entered, because the United States court had acquired prior jurisdiction of the entire subject-matter, the attempted appointment necessarily falls with the decree, for the reason that the decree removing the Farmers' Loan and Trust Company having been set aside, there was in fact no vacancy.

No sale, judicial or otherwise, for a valuable consideration is shown or attempted to be shown. Nothing is shown to have been done by the Equitable Trust Company, nor, by the terms of the document, is it required to pay any consideration or to be a *bona fide* purchaser for value.

If the successful party to an erroneous decree gains title to the property by that decree, it is undisputed that upon a reversal of the decree he must restore title to his opponent. So, if, while he held the title under the erroneous decree, he transferred it to a third party for love and affection only, and not for a valuable consideration, upon a reversal of the erroneous decree it is equally clear

that both he and his grantee must restore the title to the original holder. The present case is exactly the same. The record shows no consideration paid by the Equitable Company, and nothing done by it in pursuance of its appointment. Therefore the appointment of the Equitable Company must fall with the reversal of the decree.

The only title *a party to the suit* acquires, or can acquire under a decree, even in the case of a judicial sale, is a *voidable* title, subject to be defeated by a reversal of the decree.

Galpin v. *Page*, 18 Wall., 350, 374.
Smith v. *Brittenham*, 109 Ill., 541.

So, also, the assignee of a judgment or decree only succeeds to the right of the party in whose favor the judgment was entered, and any title which he acquires under such judgment is subject to be defeated by a subsequent reversal.

McIlton v. *Love*, 13 Ill., 486.
Roberts v. *McClelland*, 82 Ill., 538.
Smith v. *Huntoon*, 134 Ill., 24.

The defense of a *bona fide* purchaser for value is an affirmative defense, and it is incumbent on parties setting it up to aver and prove that the defendant *actually paid the purchase price* in money—an obligation to pay is not sufficient—and that *this payment was made before notice*, and in reliance upon the apparently absolute title.

Boone v. *Chiles*, 10 Peters, 177.
Wormley v. *Wormley*, 8 Wheat., 421–449.
Smith v. *Orton*, 18 U. S. Sup. Ct. Reports (L. C. P. Co. Ed.), 62.

Keyes v. *Test*, 33 Ill., 317.
Roseman v. *Miller*, 84 Ill., 299.

In *Boone* v. *Chiles* the court said:

"*A new case is presented not responsive to the bill.* * * * *It must be established affirmatively by the defendant* independently of his oath. In setting it up by plea or answer it must state the deed of purchase, the date, parties and contents briefly, that the vendor was seized and in possession. The consideration must be stated *with a distinct averment that it was bona fide and truly paid independently of the recital in the deed.* Notice must be denied previous to *and down to the time of paying the money and the delivery of the deed.*"

In considering this question of *bona fide* purchaser for value, the supersedeas is immaterial. A supersedeas is simply for the purpose of staying the action of the court's officers. An appeal or writ of error is none the less *lis pendens* because there is no supersedeas.

Carr v. *Kates*, 9 S. W. Rep., 659.
Galpin v. *Page*, 18 Wall., 350.

A certain line of decisions give protection to a purchaser at a judicial sale. Such sale is, however, entirely distinct and different from a sale made by the successful party to an erroneous decree. The purchaser at a judicial sale is protected because of public policy in encouraging bidders at such sales. In such a case the purchaser deals with the court's officers. The sale is the court's and to encourage bidders and to protect the best prices in the interest both of the judgment creditor and the judgment debtor, the law has established the rule, as a rule of policy, that a third person purchasing at such judicial sale shall acquire an absolute title. This rule, however, does not apply to the successful party in an erroneous decree. Where the sale is not strictly what is known as

a judicial sale, where the purchase is made by the successful party to the decree, the purchaser takes with all the chances of reversal.

Clary v. *Marshall*, 4 Dana, 96.
Smith v. *Brittenham*, 109 Ill., 540.
Madeira's Heirs v. *Hopkins*, 12 B. Mon., 595.
Marks v. *Cowles*, 61 Ala., 209, 307.
Reynolds v. *Harris*, 14 Cal., 668.

IN ANY VIEW, THE ORDER OF THE SUPREME COURT OF ILLINOIS WAS NOT INCONSISTENT WITH THE OPINION OF THIS COURT, AND WAS, THEREFORE, IN CONFORMITY WITH THE MANDATE.

Plainly, however, the Supreme Court of Illinois acted in this cause within the mandate and direction of this court. This court found that the Federal court in Chicago had, in the foreclosure proceedings, acquired prior jurisdiction of the entire subject-matter. It reversed the judgment of the Supreme Court of Illinois and directed that future proceedings should not be inconsistent with its opinion. When that mandate came before the Illinois Supreme Court it reversed the decree it had before affirmed. That certainly was in exact conformity with the mandate of this court. That decree being reversed, the direction was that further proceedings should be in conformity with the opinion of this court. This court had said that the Federal court had acquired prior jurisdiction. Any remanding order of the Illinois Supreme Court would be proper that was not inconsistent with that holding of the opinion. The Illinois Supreme Court was therefore at liberty, in remand-

ing the cause to the Superior Court, to give it such directions as it thought best, provided they were not inconsistent with the opinion of this court. The Supreme Court directed the Superior Court to dismiss the bill. In what particular was that order inconsistent with the opinion of this court? If the Federal court had prior jurisdiction of the subject-matter, the Supreme Court of Illinois could apply the rule of comity as between courts of concurrent jurisdiction in any way that it chose, so long as it was not inconsistent with the opinion of this court. The Supreme Court of Illinois evidently considered that the best way to preserve and maintain comity between the two *nisi prius* courts of concurrent jurisdiction was by completely discontinuing the case in the state *nisi prius* court. Was this inconsistent with the opinion of this court? The opinion of this court did not direct the Supreme Court of Illinois to remand the case with directions to dismiss or to stay the cause, but left it entirely within the discretion of the Supreme Court of Illinois so long as such discretion was not inconsistent with this court's opinion. Inasmuch as the action taken was not inconsistent with the opinion of this court, this court cannot review that action, even although that action went farther or was more radical than this court contemplated. The direction to dismiss the bill was not inconsistent with this court's opinion and therefore must stand.

All these matters show this present writ of error to have been so plainly taken for delay that we feel justified in presenting these motions.

THE WRIT OF ERROR AND SUPERSEDEAS ARE IN THIS CASE DISCRETIONARY.

"A writ of error to the highest court of a state is not allowed as a right, and ought not to be sent out when the court in session, after hearing, is of opinion that it is apparent upon the face of the record that the issue of the writ would only result in the affirmance of the judgment.."

In re Kemmler, 136 U. S., 436.
Spies v. *Illinois*, 123 U. S., 131.
Twitchell v. *Commonwealth*, 7 Wall., 321.

In the last case the court said:

"The writs of error to state courts have never been allowed as of right."

The writ of error in this case being, therefore, not a matter of right, but discretionary, and the *supersedeas* thereon being likewise discretionary, the motion to vacate the *supersedeas*, thereby allowing the Superior Court of Cook County to dismiss the bill, is addressed to the discretion of the court.

Under all the circumstances and considering all the unnecessary delay that has heretofore occurred in this litigation, we respectfully submit that this motion ought to be granted and the *supersedeas* vacated.

The writ of error in this case was allowed on April 23, 1901, returnable in thirty days, and this motion is submitted before the return day of the writ. But this practice is expressly authorized in *Clark* v. *Hancock*, 94 U. S., 493, where the change from the old practice is noticed, and it is said that the court will entertain a motion to dismiss before the return day of the writ, as "likely to prevent delays and expense and further the ends of justice."

AS THE ORDER OF JUDGMENT OF THE STATE SUPREME COURT WAS IN ACCORDANCE WITH THE MANDATE OF THIS COURT, THE WRIT OF ERROR SHOULD BE DISMISSED.

Where a writ of error has been taken from a judgment of an inferior court entered in exact accordance with the mandate of this court, and that fact is shown to this court, it will act at once, *on motion*, and the writ of error will be dismissed with costs.

Where the proceedings upon the mandate follow the mandate a second writ of error cannot be maintained.

Texas & P. R. Co. v. *Anderson*, 149 U. S., 237.

In May's U. S. Sup. Ct. Prac. it is said on p. 380:

"An appeal or writ of error will not be entertained from a decree or judgment of an inferior court entered in exact accordance with the mandate of the Supreme Court issued upon a previous appeal or writ of error, inasmuch as such a decree or judgment, when entered below, is, in effect, the decree or judgment of the Supreme Court, and its review would be practically a review of its own decision. If such an appeal shall be taken or such writ of error brought, the Supreme Court will, however, examine the decree or judgment, entered by the court below; and if it finds that it conforms to the mandate, the appeal or writ of error will be dismissed with costs. (*Mason* v. *Pewabic Mining Co.*, 153 U. S., 361, 366; *Texas and Pacific Railway* v. *Anderson*, 149 U. S., 237, 242; *Kingsbury* v. *Buckner*, 134 U. S., 650, 671; *Humphrey* v. *Baker*, 103 U. S., 736, 737; *Stewart* v. *Salamon*, 97 U. S., 361; *Tyler* v. *Maguire*, 17 Wallace, 253; *Cook* v. *Bromley*, 11 Wallace, 672, 677; *Washington Bridge Co.* v. *Stewart*, 3 Howard, 413, 424)."

Upon a motion to dismiss this court will examine to

see if the proceedings in the inferior court conform to its mandate, and if it finds that they did conform to its mandate, the writ of error will be, *on motion*, dismissed.

Cook v. *Bromley*, 11 Wall., 672.
Stewart v. *Salamon*, 97 U. S., 361.
Humphrey v. *Baker*, 103 U. S., 736.

In *Whitney* v. *Cook*, 99 U. S., 607, the court said:

"Parties should not be subject to the delay of proceedings for review in this court without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked."

In *Chanute City* v. *Trader*, 132 U. S., 210, the court said:

"In the present case there does not appear to be any ground for contending that this court has no jurisdiction; yet we are entirely satisfied that the reasons assigned for taking the writ of error are frivolous and that it was taken for delay only." And the court affirmed the judgment.

HERBERT B. TURNER,

WILLIAM BURRY,

Solicitors for the Farmers' Loan and Trust Company.

Office Supreme Court U. S.
FILED
MAY 25 1901
JAMES H. McKENNEY,
Clerk

Nos. 669 & 687.
Add'l Brf. of Turner & Durrey for

Supreme Court of the United States. O. T.

OCTOBER TERM, A. D., 1900.

Filed May 25, 1901.

THE LAKE STREET ELEVATED RAILROAD COMPANY, *Plaintiff in Error,*	
vs.	No. 669 and No. 687.
THE FARMERS' LOAN AND TRUST COMPANY et al., *Defendants in Error.*	

ADDITIONAL SUGGESTIONS ON MOTIONS.

As stated in the suggestions formerly filed by us in this case, the plaintiff in error did not file the transcript of the record in this court in time for us to make the motions to vacate the *supersedeas*, dismiss the writ of error, etc., now pending in this court. We, therefore, had a duplicate record prepared and filed in the cause in this court in which the *supersedeas* was granted on May 13, 1901.

In doing so we supposed we were simply filing the record which he had said by letter on April 29th, was then on its way to this court. That letter is now filed in this court in No. 669.

We have just been informed by letter from the clerk of this court that the attorney for plaintiff in error has now, on the return day of the writ, filed and docketed a transcript of record made by the Illinois Supreme Court clerk in obedience to the writ of error issued herein; and he seems to have succeeded in having it filed and docketed as No. 687 of this term.

This makes two cases pending in this court at the same time on the same writ of error.

This is evidently done in order to embarrass the defendant in error in case its motions prevail. The motions were made and submitted in No. 669, both sides filing suggestions. If the court allows the motions a mandate will issue in that case. It is, evidently, however, the intention of plaintiff in error to then insist that the *supersedeas* remains undisposed of in the case he has lately docketed, No. 687.

We think No. 687 was improperly docketed by the clerk and that there cannot be two cases pending in this court on the same writ of error.

We therefore respectfully request that No. 687 be dismissed or else consolidated with No. 669. If, however, they must both remain, as the clerk has so docketed them, we then request that if any order is entered in No. 669 the same order be entered in No. 687. Otherwise the docketing of the two transcripts on one writ of error may possibly result in an order entered in the first case being neutralized by the filing of the other transcript.

HERBERT B. TURNER,

WILLIAM BURRY,

Solicitors for The Farmers' Loan and Trust Co.